

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEANNETTA MARTIN-SANFORD,

Plaintiff, No. CIV S-04-2554 PAN

VS.

JO ANNE B. BARNHART,  
Commissioner of Social Security,

Defendant. ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying an application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“Act”). For the reasons discussed below, the court will deny plaintiff’s motion for summary judgment, deny the Commissioner’s cross-motion for summary judgment, and order this matter remanded for further proceedings consistent with this order.

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1 I. Factual and Procedural Background

2 In a decision dated May 27, 2004, the ALJ determined plaintiff was not disabled.<sup>1</sup>  
3 The ALJ's decision became the final decision of the Commissioner when the Appeals Council  
4 denied plaintiff's request for review. The ALJ found plaintiff has severe impairments of  
5 osteoarthritis and degenerative disc disease of the spine, but that these impairments alone or in  
6 combination do not meet or medically equal a listed impairment; the plaintiff's subjective  
7 allegations of pain are not credible; plaintiff has the residual functional capacity to perform light  
8 exertion with occasional climbing, balancing, stooping, kneeling, crouching and crawling and  
9 with avoidance of working in environments where there are extreme temperature changes;

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11 <sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the  
12 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income ("SSI") is paid  
13 to disabled persons with low income. 42 U.S.C. § 1382 et seq. Under both provisions, disability  
14 is defined, in part, as an "inability to engage in any substantial gainful activity" due to "a  
medically determinable physical or mental impairment." 42 U.S.C. §§ 423(d)(1)(a) &  
1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R.  
§§ 423(d)(1)(a), 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The  
15 following summarizes the sequential evaluation:

16 Step one: Is the claimant engaging in substantial gainful  
17 activity? If so, the claimant is found not disabled. If not, proceed  
18 to step two.

Step two: Does the claimant have a "severe" impairment?  
If so, proceed to step three. If not, then a finding of not disabled is  
appropriate.

Step three: Does the claimant's impairment or combination  
of impairments meet or equal an impairment listed in 20 C.F.R., Pt.  
404, Subpt. P, App.1? If so, the claimant is automatically  
determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past  
work? If so, the claimant is not disabled. If not, proceed to step  
five.

Step five: Does the claimant have the residual functional  
capacity to perform any other work? If so, the claimant is not  
disabled. If not, the claimant is disabled. \_\_\_\_\_

24 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

25 The claimant bears the burden of proof in the first four steps of the sequential evaluation  
26 process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential  
evaluation process proceeds to step five. Id.

1 plaintiff is capable of performing a significant number of jobs that exist in the national economy;  
2 and plaintiff is not disabled. Administrative Transcript (“AT”) 17-18. Plaintiff contends that the  
3 ALJ erred at step two of the sequential analysis by not recognizing all of plaintiff’s severe  
4 impairments and in his determination that plaintiff did not suffer an impairment or combination  
5 of impairments that met or equaled a listing; the ALJ erred in his determination of plaintiff’s  
6 residual functional capacity; the ALJ relied upon an incomplete hypothetical to the vocational  
7 expert (VE); and the ALJ improperly discredited the weight of plaintiff’s treating physician and  
8 plaintiff’s subjective complaints of pain.<sup>2</sup>

## 9 || II. Standard of Review

The court reviews the Commissioner's decision to determine whether (1) it is based on proper legal standards under 42 U.S.C. § 405(g), and (2) substantial evidence in the record as a whole supports it. Copeland v. Bowen, 861 F.2d 536, 538 (9th Cir. 1988) (citing Desrosiers v. Secretary of Health and Human Services, 846 F.2d 573, 575-76 (9th Cir. 1988)). Substantial evidence means more than a mere scintilla of evidence, but less than a preponderance. Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996) (citing Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 402, 91 S. Ct. 1420 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229, 59 S. Ct. 206 (1938)). The record as a whole must be considered, Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986), and both the evidence that supports and the evidence that detracts from the ALJ's conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the ALJ's decision simply by isolating a specific quantum of supporting evidence. Id.; see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative findings, or if there is conflicting evidence

<sup>26</sup><sup>2</sup>The Government response addresses only the weighing of medical evidence, plaintiff's credibility, and the ALJ's consideration of plaintiff's combination of impairments.

1 supporting a finding of either disability or nondisability, the finding of the ALJ is conclusive, see  
2 Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an  
3 improper legal standard was applied in weighing the evidence, see Burkhardt v. Bowen, 856 F.2d  
4 1335, 1338 (9th Cir. 1988).

5 III. Analysis

6 a. The ALJ Committed Harmless Error at Step Two of the Sequential Analysis

7 Plaintiff contends the ALJ improperly assessed the severity of her impairments  
8 and failed to consider all of them in combination. An impairment is “not severe” only if it  
9 “would have no more than a minimal effect on an individual’s ability to work, even if the  
10 individual’s age, education, or work experience were specifically considered.” SSR 85-28. This  
11 assessment is done at step two of the sequential analysis, and its purpose is to identify claimants  
12 whose medical impairment is so slight that it is unlikely they would be disabled even if age,  
13 education, and experience were taken into account. Bowen v. Yuckert, 482 U.S. 137, 107 S. Ct.  
14 2287 (1987). “The step-two inquiry is a de minimis screening device to dispose of groundless  
15 claims.” Smolen v. Chater 80 F.3d 1273, 1290 (9th Cir. 1996); see also Edlund v. Massanari,  
16 253 F.3d 1152, 1158 (9th Cir. 2001). Impairments must be considered in combination in  
17 assessing severity. 20 C.F.R. § 404.1523.

18 The burden is on plaintiff at step two of the sequential evaluation. See Tidwell v.  
19 Apfel, 161 F.3d 599, 601 (9th Cir. 1998). Plaintiff argues the ALJ failed to recognize as severe a  
20 number of alleged impairments, including heart palpitations. Furthermore, plaintiff contends that  
21 the ALJ failed to consider the combination of plaintiff’s condition; the recognized severe  
22 impairments of osteoarthritis and degenerative disc disease as well as her alleged additional  
23 impairments of heart palpitations and leg pain. Plaintiff’s memorandum at 7: 25-26.

24 The de minimis nature of plaintiff’s burden is a recognition of the fact that step  
25 two analysis exists to screen only the most baseless claims. Plaintiff’s complaint of heart trouble  
26 does not fit into this category. In this case, plaintiff presented objective medical evidence to

1 support her claims of heart trouble. See Webb v. Barnhart, 433 F.3d 683 (9th Cir. 2005); Ukolov  
2 v. Barnhart, 420 F.3d 1002, 1005 (9th Cir. 2005)(upholding step two denial when there was no  
3 medically acceptable clinical evidence to support plaintiff's subjective complaints). The initial  
4 treatment for plaintiff's heart problem required two days of hospitalization. AT 105. Her  
5 follow-up care required four days. AT 117. Following a diagnosis of cardiac arrhythmia,  
6 plaintiff's treating physician prescribed nitroglycerin, AT 105, which she continued to use upon  
7 her evaluation by the examining physician, AT 138, and maintained through the hearing date.  
8 Furthermore, plaintiff testified she often used nitroglycerin the few times each month that she  
9 exerted herself, AT 36, and experienced dizziness and numbness in her extremities, symptoms  
10 consistent with heart trouble. Based upon this evidence, it is clear that plaintiff's cardiac  
11 arrhythmia was a severe impairment that should have been considered by the ALJ.

12 The ALJ provided no reason for concluding that plaintiff's cardiac arrhythmia was  
13 not severe. However, the ALJ's heavy weighting of the medical opinion of the examining  
14 physician, as well as his apparent reliance on the exertional recommendations of the  
15 nonexamining physician imply that he was influenced by their lack of any explicit mention of  
16 any significant cardiac limitations. Furthermore, the record reveals that plaintiff has not had any  
17 follow-up care for her heart problems since her final hospitalization in December 2002. In fact,  
18 plaintiff appears to have skipped her follow-up appointment scheduled for one month following  
19 her discharge. AT 152. Finally, the ALJ expressly discounted the subjective complaints of  
20 plaintiff, includingr testimony of heart trouble and their impact on her daily activities. AT 16.

21 In spite of the low threshold of step two, it was improper for the ALJ to fail to  
22 consider plaintiff's cardiac arrhythmia as a severe impairment. The record provides substantial  
23 evidence of the impact this condition has had upon plaintiff's health and her ability to work.  
24 While not explicit in their findings, the doctors' opinions that plaintiff is limited to light work is  
25 a recognition of her limitations, be they orthopedic or cardiac. Furthermore, as explained more  
26 fully below, plaintiff's subjective complaints were improperly discounted by the ALJ.

1           With regards to plaintiff's complaint of leg pain, the ALJ did not commit error.  
2 While plaintiff testimony regarding her pain, there is no objective evidence to support such a  
3 diagnosis. Moreover, plaintiff's contention that "chronic pain" should be considered a severe  
4 impairment ignores the governing regulations. Pain is a symptom, not an impairment. See 20  
5 C.F.R. § 404.1529 ("[S]ymptoms . . . will not be found to affect your ability to do basic work  
6 activities unless medical signs or laboratory findings show that a medically determinable  
7 impairment(s) is present."); SSR 95-5p; see also Smolen 80 F.3d at 1281; In re Heckler, 751 F.2d  
8 954, 955 n.1 (8th Cir. 1984) ("pain is a symptom, not an impairment"). It was not error for the  
9 ALJ to dismiss plaintiff's leg pain at step two.

10           In spite of the error regarding plaintiff's arrhythmia, remand is not required. As  
11 explained below, failure to consider plaintiff's cardiac problems was harmless error. See Curry  
12 v. Sullivan, 925 F.2d 1127, 1129 (9th Cir. 1990) (harmless error analysis applicable in judicial  
13 review of social security cases). There is no basis upon which to disturb the ALJ's ruling.

14           b. The ALJ Committed Harmless Error by Determining that Plaintiff's Impairments did  
15 not Meet or Equally a Listed Impairment.

16           The Social Security Regulations "Listing of Impairments" is comprised of  
17 impairments to fourteen categories of body systems that are severe enough to preclude a person  
18 from performing gainful activity. Young v. Sullivan, 911 F.2d 180, 183-84 (9th Cir. 1990); 20  
19 C.F.R. § 404.1520(d). Conditions described in the listings are considered so severe that they are  
20 irrebuttably presumed disabling. 20 C.F.R. § 404.1520(d). In meeting or equaling a listing, all  
21 the requirements of that listing must be met. Key v. Heckler, 754 F.2d 1545, 1550 (9th Cir.  
22 1985).

23           The ALJ's determination that plaintiff's osteoarthritis and degenerative disc  
24 disease did not meet a listed impairment was not in error. These impairments are analyzed as  
25 musculoskeletal impairments under Section 1 of the listing. 20 C.F.R. Pt. 404, Subpt. P, App. 1.  
26 Given the objective medical evidence concerning plaintiff's conditions; including the numerous

1 radiological images; treating, examining, and nonexamining physicians' opinions; and the  
2 testimony of plaintiff concerning her subjective complaints and her daily limitations, the ALJ's  
3 determination that plaintiff did not meet or equal a listing was proper.

4 Furthermore, even considering plaintiff's cardiac arrhythmia, it is apparent that  
5 plaintiff does not have an impairment or combination of impairments that meet or exceed a  
6 listing. Cardiac arrhythmia are evaluated as disorders of the cardiovascular system. 20 C.F.R.  
7 Pt. 404, Subpt. P, App. 1, Section 4. An examination of the listing reveals plaintiff's arrhythmia,  
8 controlled by medication and limited in occurrence, are not severe enough to require the statutory  
9 conclusion of disabled. As a result, the medical evidence does not warrant a finding that plaintiff  
10 is presumptively disabled because of her heart problems.

11 Plaintiff's heart trouble is only one of several impairments. If a plaintiff has more  
12 than one impairment, they must be considered in combination. 20 C.F.R. § 404.1526(a); Lester  
13 v. Chater, 81 F.3d 821, 829 (9th Cir. 1995) ("[symptoms] must be considered in combination and  
14 must not be fragmentized in evaluating their effects"). The determination that a combination of  
15 impairments equals a listing must be based upon medical evidence only. 20 C.F.R. §  
16 404.1529(d)(3). Even with a finding that plaintiff's cardiac arrhythmia was a severe impairment,  
17 there is no combination of impairments supported by the medical evidence that equals a listing.

18 There is no medical evidence in the record supporting any theory that plaintiff's  
19 heart troubles exacerbate her osteoarthritis and degenerative disc disease. See Lewis v. Apfel,  
20 236 F.3d 503, 514 (9th Cir. 2001). While plaintiff testified that her weak heart caused her to feel  
21 numbness and tingling in her extremities, AT 35, and caused a "pounding" that "gets painful,"  
22 AT 36, there are no objective medical findings of any physician to support any link with her  
23 osteoarthritis or disc degeneration. Because the inclusion of plaintiff's heart disease into the step  
24 two analysis does not change the result, the ALJ's error must be considered harmless. See Curry,  
25 925 F.2d at 1129.

26 c. The ALJ Erred in his Determination of Plaintiff's Residual Functional Capacity.

1 Social Security Ruling 96-8p sets forth the policy interpretation of the  
2 Commissioner for assessing residual functional capacity. SSR 96-8p. Residual functional  
3 capacity is what a person “can still do despite [the individual’s] limitations.” 20 C.F.R.  
4 §§ 404.1545(a), 416.945(a) (2003); see also *Valencia v. Heckler*, 751 F.2d 1082, 1085 (9th Cir.  
5 1985) (residual functional capacity reflects current “physical and mental capabilities”). In this  
6 case, the ALJ concluded that plaintiff retains the residual function capacity to “perform light  
7 exertion with occasional climbing, balancing, stooping, kneeling, crouching and crawling and  
8 with avoidance of working in environments where there are extreme temperature changes.” AT  
9 18. This conclusion is not supported by substantial evidence in the record.

10 The ALJ properly noted that multiple medical opinions determined that plaintiff  
11 retained some capacity for work. AT 15. Dr. Cassim opined that plaintiff was capable of  
12 performing many of the tasks associated with light work,<sup>3</sup> including carrying 20 pounds  
13 occasionally and 10 pounds frequently, walking or standing up to six hours in an eight hour  
14 workday with frequent breaks every hour, and without any restriction on sitting. AT 142. Dr.  
15 Cassim did restrict plaintiff from any bending, stooping, crouching, climbing, kneeling,  
16 balancing, crawling, or pulling because of her back pain and arthritis. Id. In addition, Dr.  
17 Cassim stated that plaintiff should avoid working in environments that experienced extremes of  
18 temperatures or heights. Id. The opinion of doctors with the State Agency differed only in that  
19 plaintiff was restricted to occasional climbing, stooping, kneeling, crouching, and crawling and  
20 there were no restrictions on balancing. AT 145.

21 These opinions differed from that of Dr. Kumar, plaintiff’s treating physician.<sup>4</sup>

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23 <sup>3</sup>Light work is defined as work that “involves lifting no more than 20 pounds at a time  
24 with frequent lifting or carrying of objects weighing up to 10 pounds,” and “a good deal of  
25 walking or standing, or when it involves sitting most of the time with some pushing and pulling  
26 of arm and leg controls.” 20 C.F.R. 404.1567(b).

27 <sup>4</sup>The court notes that the record contains medical consults from Dr. Anil Kumar, who  
28 provided cardiology consults upon plaintiff’s admission to the hospital in 2002. All references in

1 According to Dr. Kumar, plaintiff could only carry 10 pounds frequently, and she could never  
2 climb, kneel, crawl, or reach below her knees or above her shoulders. AT 190. In addition, Dr.  
3 Kumar stated that plaintiff could only occasionally balance, stoop, or crouch, and could only  
4 occasionally reach in the area between her knees and her shoulders. Id.

5 It is important to note that no doctor opined that any of plaintiff's restrictions were  
6 the result of her heart problems. In fact, in making their determination, the State Agency doctors  
7 expressly noted that plaintiff's heart palpitations were controlled by medication. AT 153. Dr.  
8 Kumar's notes never indicated that plaintiff's heart is anything other than normal. AT 154, 156-  
9 64. Furthermore, Dr. Kumar's letter dated July 22, 2004, addressed "To Whom It May  
10 Concern," states that plaintiff is disabled, citing her hernia damage, osteoarthritis, spurring of the  
11 joints in the hands, and depression, yet makes no mention of plaintiff's heart problems. AT 194.

12 Despite the fact that the ALJ placed significant weight on the opinion of Dr.  
13 Cassim, his ultimate conclusion regarding plaintiff's residual functional capacity exceeded Dr.  
14 Cassim's recommendation in that it did not completely restrict plaintiff's postural abilities. As a  
15 result, the only opinion upon which the ALJ based his determination that plaintiff could  
16 occasionally climb, balance, stoop, kneel, crouch, and crawl was offered by the nonexamining  
17 physician at the State Agency. In light of the dramatically contrary opinion of Dr. Kumar, the  
18 treating physician, and given the ALJ's stated acceptance of the opinion of Dr. Cassim, the  
19 examining physician, it cannot be said that the opinion of the nonexamining physician provides  
20 the substantial evidence necessary to support a finding that plaintiff is capable of occasional  
21 climbing, balancing, stooping, kneeling, crouching and crawling. See Lester v. Chater, 81 F.3d  
22 821, 831 (9th Cir. 1995)(holding that the opinion of a non-examining professional, without other  
23 evidence, is insufficient to reject the opinion of a treating or examining professional).

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26 the opinion will be to Dr. Kain Kumar, her treating physician, unless otherwise noted.

1                   The ALJ's residual function determination appears to have been influenced by his  
2 credibility assessment of the plaintiff. Credibility determinations do factor into evaluations of  
3 medical evidence. Webb v. Barnhart, 433 F.3d 683, 688 (9th Cir. 2005); see e.g. Batson v.  
4 Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004). However, as noted below,  
5 this credibility assessment was in error. Therefore, any influence this credibility assessment of  
6 plaintiff may have had on the ALJ's weighing of the multiple medical opinions is also flawed.

7                   The record contains the opinion of two doctors who performed hands-on  
8 assessments of plaintiff. To the opinion of one of these doctors, the ALJ assigned significant  
9 weight. For the ALJ to disregard the medical opinions of these doctors in favor of a  
10 nonexamining physician was error. Without more, the nonexamining physician's opinion cannot  
11 provide the substantial weight necessary to support the residual functional capacity  
12 determination. Remand is necessary in order for the ALJ to properly evaluate the residual  
13 functional capacity in light of all of the properly weighed evidence in the record.

14                   d. The ALJ Improperly Relied Upon a Incomplete Hypothetical Offered to the  
15 Vocational Expert.

16                   Hypothetical questions posed to a vocational expert must set out all the  
17 substantial, supported limitations and restrictions of the particular claimant. Magallanes v.  
18 Bowen, 881 F.2d 747, 756 (9th Cir. 1989). If a hypothetical does not reflect all of the claimant's  
19 limitations, the expert's testimony as to jobs in the national economy the claimant can perform  
20 has no evidentiary value. DeLorme v. Sullivan, 924 F.2d 841, 850 (9th Cir. 1991). While the  
21 ALJ may pose to the expert a range of hypothetical questions, based on alternate interpretations  
22 of the evidence, the hypothetical that ultimately serves as the basis for the ALJ's determination  
23 must be supported by substantial evidence in the record as a whole. Embrey v. Bowen, 849 F.2d  
24 418, 422-23 (9th Cir. 1988).

25                   The ALJ ultimately based his findings upon a hypothetical that concluded plaintiff  
26 was limited to light exertion with occasional climbing, balancing, stooping, kneeling, crouching

1 and crawling and with avoidance of working in environments where there are extreme  
2 temperature changes. AT 17. In response, the VE stated that a significant number of jobs  
3 existed in the national economy for which plaintiff was qualified, including small product  
4 assembly, packing, cafeteria attendant, and laborer. AT 43-44. In reliance upon this expert  
5 opinion, the ALJ determined that plaintiff was not disabled. AT 17.

6 The hypothetical upon which the ALJ relied did not fully capture all of plaintiff's  
7 limitations. Specifically, the hypothetical was based upon a residual functional capacity not  
8 supported by substantial evidence in the record. Consequently, the hypothetical did not provide  
9 an accurate picture of the full range of jobs plaintiff is physically capable of performing.  
10 Accordingly, reliance upon it by the ALJ was in error. Remand is necessary in order to permit  
11 the evaluation of any additional hypotheticals which may become necessary as the evidence is  
12 evaluated and the record developed.

13 e. The ALJ Improperly Weighed the Opinion of Plaintiff's Treating Physician.

14 The weight given to medical opinions depends in part on whether they are  
15 proffered by treating, examining, or non-examining professionals. Lester v. Chater, 81 F.3d 821,  
16 830 (9th Cir. 1995). Ordinarily, more weight is given to the opinion of a treating professional,  
17 who has a greater opportunity to know and observe the patient as an individual. Id.; Smolen v.  
18 Chater, 80 F.3d 1273, 1285 (9th Cir. 1996).

19 To evaluate whether an ALJ properly rejected a medical opinion, in addition to  
20 considering its source, the court considers whether (1) contradictory opinions are in the record;  
21 and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted opinion of a  
22 treating or examining medical professional only for "clear and convincing" reasons. Lester, 81  
23 F.3d at 831. In contrast, a contradicted opinion of a treating or examining professional may be  
24 rejected for "specific and legitimate" reasons. Lester, 81 F.3d at 830. While a treating  
25 professional's opinion generally is accorded superior weight, if it is contradicted by a supported  
26 examining professional's opinion (supported by different independent clinical findings), the ALJ

1 may resolve the conflict. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing  
2 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). In any event, the ALJ need not give  
3 weight to conclusory opinions supported by minimal clinical findings. Meanel v. Apfel, 172  
4 F.3d 1111, 1113 (9th Cir. 1999) (treating physician's conclusory, minimally supported opinion  
5 rejected); see also Magallanes, 881 F.2d at 751. The opinion of a non-examining professional,  
6 without other evidence, is insufficient to reject the opinion of a treating or examining  
7 professional. Lester, 81 F.3d at 831.

8 As noted above, the opinion of the treating physician, Dr. Kumar, was that  
9 plaintiff was significantly disabled, unable to lift any weight over 10 pounds, and incapable of  
10 walking or standing for longer than five minutes. AT 194. This opinion was contradicted by the  
11 opinion of Dr. Cassim, the examining physician, as well as the nonexamining physician from the  
12 State Agency. Both of these contradictory opinions determined that plaintiff was capable of  
13 significantly more lifting and movement than Dr. Kumar.

14 In spite of these contrary opinions, it was error for the ALJ to discredit the  
15 findings of Dr. Kumar. The ALJ stated that Dr. Kumar's opinion was not supported by the  
16 objective evidence in the record and merely repeated claims made by the plaintiff. However,  
17 radiologic studies of plaintiff's back show moderate neural stenosis, or narrowing of the space at  
18 the center of the spine, a condition that can cause pain by putting pressure on the spinal cord and  
19 nerves. AT 151. If Dr. Kumar repeated plaintiff's claims, it appears he did so because they were  
20 supported by the objective medical evidence.

21 The ALJ stated that he also discredited the treating physician's opinion because  
22 Dr. Kumar first saw plaintiff shortly before she filed her application for benefits. AT 16. The  
23 fact that Dr. Kumar saw plaintiff just a few weeks prior to her filing is not a sufficient reason to  
24 discredit his opinion. Lester, 81 F.3d at 830 ("The purpose for which medical reports are  
25 obtained does not provide a legitimate basis for rejecting them.") Furthermore, any implication  
26 that Dr. Kumar was simply a hired gun for the purposes of a favorable opinion is discredited by

1 his continued treatment of plaintiff. Dr. Kumar saw plaintiff no fewer than 10 times after his  
2 initial assessment, AT 155-64, and was concerned enough about her complaints to order two  
3 MRIs, one on January 31, 2002, and an additional one on July 7, 2003. AT 165, 167.

4 The reasons offered by the ALJ to discredit the opinion of the treating physician  
5 are specific. However, substantial evidence in the record does not support their legitimacy. The  
6 findings of the ALJ discrediting the opinion of plaintiff's treating physician cannot be upheld.  
7 Remand is necessary in order for the ALJ to properly weigh the medical evidence.

8 f. The ALJ Improperly Evaluated Plaintiff's Complaints of Pain.

9 The ALJ determines whether a disability applicant is credible, and the court defers  
10 to the ALJ's discretion if the ALJ used the proper process and provided proper reasons. See, e.g.,  
11 Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1995). If credibility is critical, the ALJ must make  
12 an explicit credibility finding. Albalos v. Sullivan, 907 F.2d 871, 873-74 (9th Cir. 1990); Rashad  
13 v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990) (requiring explicit credibility finding to be  
14 supported by "a specific, cogent reason for the disbelief").

15 In evaluating whether subjective complaints are credible, the ALJ should first  
16 consider objective medical evidence and then consider other factors. Bunnell v. Sullivan, 947  
17 F.2d 341, 344 (9th Cir. 1991) (en banc). If there is objective medical evidence of an impairment,  
18 the ALJ then may consider the nature of the symptoms alleged, including aggravating factors,  
19 medication, treatment and functional restrictions. See id. at 345-47. The ALJ also may consider:  
20 (1) the applicant's reputation for truthfulness, prior inconsistent statements or other inconsistent  
21 testimony, (2) unexplained or inadequately explained failure to seek treatment or to follow a  
22 prescribed course of treatment, and (3) the applicant's daily activities. Smolen v. Chater, 80 F.3d  
23 1273, 1284 (9th Cir. 1996); see generally SSR 96-7P, 61 FR 34483-01; SSR 95-5P, 60 FR  
24 55406-01; SSR 88-13. Work records, physician and third party testimony about nature, severity  
25 and effect of symptoms, and inconsistencies between testimony and conduct also may be  
26 relevant. Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir. 1997). A failure

1 to seek treatment for an allegedly debilitating medical problem may be a valid consideration by  
2 the ALJ in determining whether the alleged associated pain is not a significant nonexertional  
3 impairment. See Flaten v. Secretary of HHS, 44 F.3d 1453, 1464 (9th Cir. 1995). The ALJ  
4 may rely, in part, on his or her own observations, see Quang Van Han v. Bowen, 882 F.2d 1453,  
5 1458 (9th Cir. 1989), which cannot substitute for medical diagnosis. Marcia v. Sullivan, 900  
6 F.2d 172, 177 n.6 (9th Cir. 1990). “Without affirmative evidence showing that the claimant is  
7 malingering, the Commissioner’s reasons for rejecting the claimant’s testimony must be clear  
8 and convincing.” Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir.  
9 1999).

10 The ALJ discredited plaintiff’s subjective complaints of pain for a number of  
11 reasons. The ALJ noted that the plaintiff’s complaint are not consistent with the objective  
12 testimony in the record. In addition, the ALJ determined that plaintiff engaged in activities that  
13 were inconsistent with her claimed level of impairment.

14 The ALJ noted that plaintiff received conservative treatment and stated that she  
15 failed to pursue more aggressive treatment strategies to combat her pain. AT 16. In addition,  
16 plaintiff failed to engage in a course of physical therapy. Id. Furthermore, while she utilized a  
17 cane for assistance, it was not apparent that any doctor had in fact prescribed one for her. Id.

18 However, as there is no evidence in the record of malingering, these reasons do  
19 not provide the clear and convincing evidence necessary to discredit plaintiff’s subjective  
20 complaints. The ALJ finds significance in the fact that plaintiff had not engaged in any home  
21 treatments to alleviate her pain. Id. However, uncontroverted testimony from the plaintiff  
22 described how she did in fact take baths. AT 38. Furthermore, plaintiff’s initial pain  
23 questionnaire stated that she used ice and ointments to relieve her symptoms. AT 92.

24 In addition, the ALJ noted that plaintiff’s activities of living in an apartment with  
25 her son, taking care of personal needs, shopping, cooking, and doing household chores cast doubt  
26 upon her subjective complaints. Plaintiff’s ability to engage in some daily activities does not

1 compromise her subjective complaints of pain. See Benecke v. Barnhart, 379 F.3d 587, 594  
2 (9thCCir. 2004); Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001); Fair v. Bowen, 885  
3 F.2d 597, 603 (9th Cir.1989) (holding that one need not be “utterly incapacitated” in order to be  
4 disabled). As plaintiff testified, her daily activities were limited by her pain, not precluded.

5 Plaintiff stated that her shopping was restricted to going to the grocery store no  
6 more than twice a month and that she was forced to sit frequently and could not stand in line  
7 without assistance. AT 34. The only other trips outside that plaintiff made were to her doctor’s  
8 office. AT 36. At home, plaintiff testified that her activities were limited to using the restroom  
9 and bathing, as her son did all of the housekeeping. AT 38. Such limited activity, consistent  
10 with attending to basic needs, does not cast serious doubt upon plaintiff’s complaints.

11 Given the errors in the ALJ’s justification, it cannot be said that clear and  
12 convincing evidence exists with which to discredit plaintiff’s complaints. Several of the factors  
13 considered by the ALJ were not supported by the evidence in the record. The ALJ’s credibility  
14 determination cannot be upheld by this court and remand is necessary to properly evaluate  
15 plaintiff’s testimony.<sup>5</sup>

16 g. The ALJ did not Consider Additional Evidence Provided After the Close of the  
17 Administrative Hearing.

18 Disability hearings are not adversarial. See DeLorme v. Sullivan, 924 F.2d 841,  
19 849 (9th Cir. 1991); see also Crane v. Shalala, 76 F.3d 251, 255 (9th Cir.1996) (ALJ has duty to  
20 develop the record even when claimant is represented). Evidence raising an issue requiring the  
21 ALJ to investigate further depends on the case. Generally, there must be some objective  
22 evidence suggesting a condition which could have a material impact on the disability decision.  
23 See Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir.1996); Wainwright v. Secretary of Health and

24  
25 <sup>5</sup>Remand is generally not appropriate when the sole issue before the ALJ is plaintiff’s  
26 credibility. See Lester, 81 F.3d at 834; Varney v. Secretary of Health and Human Services, 859  
F.2d 1396, 1401 (9th Cir. 1988). However, as this case presents multiple issue for  
reconsideration by the ALJ, a finding in favor of plaintiff is not warranting.

1 Human Services, 939 F.2d 680, 682 (9th Cir.1991). “Ambiguous evidence . . . triggers the ALJ’s  
2 duty to ‘conduct an appropriate inquiry.’” Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir.  
3 2001) (quoting Smolen, 80 F.3d at 1288.)

4 In this case, the ALJ closed the hearing and refused to consider additional evidence  
5 proffered by plaintiff. AT 47-48. This evidence included an additional report from Dr. Kumar  
6 and an MRI of plaintiff’s hand. AT 47. The additional evidence from Dr. Kumar, which appears  
7 to be a letter dated July 12, 2004, and addressed “To Whom It May Concern,” is contained in the  
8 record of proceeding for this case. AT 194. The x-ray was not included in the record of  
9 transcript and was included in plaintiff’s appeal to this court.

10 A case may be remanded to the Secretary for the consideration of new evidence if  
11 the evidence is material and good cause exists for the absence of the evidence from the prior  
12 record. Sanchez v. Secretary of HHS, 812 F.2d 509, 511-12 (9<sup>th</sup> Cir. 1987). In order for new  
13 evidence to be “material,” the court must find that, had the Secretary considered this evidence,  
14 the decision might have been different. The court need only find a reasonable possibility that the  
15 new evidence would have changed the outcome of the case. Booz v. Secretary of Health and  
16 Human Services, 734 F.2d 1378, 1380-81 (9th Cir. 1984).

17 There is a reasonable probability that consideration of this evidence might have  
18 changed the outcome; possibly affecting the residual functional capacity, credibility assessments,  
19 or the hypothetical relied upon by the ALJ and the subsequent response from the VE. The letter  
20 from plaintiff’s treating physician provides a strong opinion of plaintiff’s limitations and their  
21 impact on her life. It documents numerous afflictions suffered by plaintiff and, given its source,  
22 presents some evidence which might have changed the outcome of the case.

23 The additional radiologic images of plaintiff’s hands provide objective evidence  
24 of a possible disability. Specifically, the impression from the MRI suggest “mild bilateral  
25 degenerative spurring affecting the [distal interphalangeal] joints” of plaintiff’s right and left  
26 thumbs. Plaintiff’s memorandum at Appendix A. This impression is consistent with plaintiff’s

1 testimony at the hearing that she was having problems with her hands that made it difficult to  
2 hold onto the everyday items. AT 35.

3 Remand to the ALJ and consideration of this medical evidence is required. The  
4 weight given by the ALJ to plaintiff's treating physician's opinion, as well as credibility  
5 assessment of plaintiff's testimony and his determination of plaintiff's residual functional  
6 capacity, may be impacted by this additional evidence. Furthermore, the additional medical  
7 evidence is relevant in light of the fact that the ability to finger and grasp was cited by the VE as  
8 a skill required for many of the jobs ultimately cited as available to plaintiff. AT 44.

9 For the foregoing reasons, this matter will be remanded under sentence four of 42  
10 U.S.C. § 405(g) for further development of the record and further findings addressing the  
11 deficiencies noted above.

12 Accordingly, IT IS HEREBY ORDERED that:

13 1. Plaintiff's motion for summary judgment is denied;  
14 2. The Commissioner's cross motion for summary judgment is denied; and  
15 3. This matter is remanded for further proceedings consistent with this order.

16 DATED: May 23, 2006.

17   
18 John F. Worldwide  
19 UNITED STATES MAGISTRATE JUDGE

20 ggh13  
21 Martin-Sanford.ssi.wpd

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